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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5506

JOSEPH CHARLES CORCELLER, JR.,
Petitioner,

versus

BONANZA INTERNATIONAL, INC. and
STEWART INVESTMENTS, INCORPORATED,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

May a trial court enter a default judgment against a defendant who refuses to file an Answer for more than ten months after the expiration of the allotted time for answering and flagrantly violates the orders of the court, where findings of fact and conclusions of law already made by the court independently support the judgment?

STATEMENT OF THE CASE

Preliminary Statement

This is a trademark infringment, unfair competition and breach of contract case brought by respondents, Bonanza International, Inc. ("Bonanza") and Stewart Investments, Incorporated ("Stewart") against petitioner, Joseph Charles Corceller, Jr., a former licensee of Bonanza and Stewart in the low-cost steak dinner restaurant business. The trial court entered a default judgment against Mr. Corceller (1) for his refusal to file an Answer for more than ten months after the expiration of the allotted time for answering under the Federal Rules of Civil Procedure; (2) for his repeated flagrant violations of the orders of the court; and (3) on the basis of extensive findings of fact and conclusions of law made during the course of the litigation. Mr. Corceller's Motion to Set Aside the Default Judgment was denied by the trial court after a hearing and the submission of detailed memoranda by the parties. The United States Court of Appeals for the Fifth Circuit affirmed the trial court's decision *per curiam*.

Statement of Facts

Bonanza is a corporation engaged in the business of franchising unique restaurants known as "Bonanza Sirloin Pits," which specialize in serving low-cost steak dinners of high quality. Stewart is an "Area Distributor" of Bonanza, with the exclusive right to license all Bonanza Sirloin Pits in the metropolitan New Orleans area and elsewhere in South Louisiana. Bonanza,

Stewart and Mr. Corceller entered into a Bonanza Sirloin Pit Licensing Agreement ("License Agreement") on or about August 25, 1969. Pursuant to the License Agreement, Mr. Corceller began operating a low-cost steak dinner restaurant under the trade name of "Bonanza Sirloin Pit No. 147" at 4211 Jefferson Highway in Jefferson Parish, Louisiana. (R, Preliminary Injunction, 2-3).

Almost immediately after the commencement of operations of his restaurant, Mr. Corceller began violating the terms of the License Agreement by refusing to buy meat from suppliers approved by Bonanza, serving menu items not specified by Bonanza, refusing to enforce standards of employee dress prescribed by Bonanza, and ignoring other contractual obligations under the License Agreement. Moreover, commencing with the week of January 4, 1971, Mr. Corceller breached the License Agreement by failing to submit weekly gross receipts reports, royalty reports, monthly operating reports, and audited Profit and Loss Statements and Balance Sheets to Bonanza. At the same time, Mr. Corceller ceased paying Bonanza and Stewart the royalties due under the License Agreement. (R, Preliminary Injunction, 2-4).

Because of Mr. Corceller's continued refusal to comply with the provisions of the License Agreement, Bonanza mailed a letter of termination to him on September 7, 1971. The letter directed Mr. Corceller to discontinue using all service marks, trademarks, trade names, signs, structures, literature, stationery, and promotional or advertising material of Bonanza. Mr.

Corceller received this letter, but failed to discontinue his use of these materials or the operation of his restaurant as a Bonanza Sirloin Pit. (R, Preliminary Injunction, 4).

The Complaint in this suit was filed by Bonanza and Stewart and served on Mr. Corceller on September 17, 1971. (R, Complaint, 1; U.S. Marshals Service Record). It sought money damages for Mr. Corceller's breach of the License Agreement and injunctive relief to stop Mr. Corceller from infringing the service marks of Bonanza and continuing to engage in the low-cost steak dinner restaurant business in violation of the terms of the License Agreement.

On October 22, 1971, the trial court conducted an extensive hearing on the Application of Bonanza and Stewart for a preliminary injunction. After this hearing, on October 28, 1971, the court issued a preliminary injunction which contained detailed findings of fact and conclusions of law. The preliminary injunction stated in part:

> (11) Prior to, and immediately after commencement of operations, Corceller violated the terms of the License Agreement in the following respects:
>
> (a) Corceller refused to buy meat from approved suppliers;
>
> (b) Corceller served menu items not specified by Bonanza;

(c) Corceller refused to enforce the standards of employee dress prescribed by Bonanza;

(d) Commencing with the week ending January 10, 1971 and thereafter to and including the present, Corceller has failed to submit weekly gross receipts reports to the plaintiffs as required by paragraph VI.G of the License Agreement. Corceller testified that he submitted these reports to his own attorney, Mr. John Brooks, but admitted that he knew that Mr. Brooks was in no way acting on behalf of Bonanza International, Inc. and/or Stewart Investments, Incorporated.

(e) Corceller failed to submit monthly operating reports and audited Profit and Loss Statements and Balance Sheets as required by paragraph VI.G of the License Agreement.

(f) Corceller has also failed to pay any royalties to plaintiffs since the week ending January 10, 1971, despite his continuing derivation of benefits from the License Agreement and his continued operation as a licensee of plaintiffs.

((R, Preliminary Injunction, 3)

In addition, the court made the following conclusions of law, among others:

(2) Bonanza properly terminated its License Agreement with Corceller, effective September 7, 1971, by giving a prior ten-day written notice of such termination in accordance with the terms of the License Agreement between Bonanza, Stewart and Corceller.

(3) Corceller has engaged in unfair competition with Bonanza and Stewart by virtue of his continued use of the names and marks here sought to be protected, thereby causing Bonanza and Stewart irreparable injury and damage.

(4) Corceller voluntarily entered into the License Agreement restricting post-termination competition with Bonanza and Stewart. This covenant was given for substantial consideration and is reasonably restricted as to time, area, and scope and therefore valid, binding, and enforceable under Louisiana law.

(5) A preliminary injunction is authorized by general equitable principles arising under the laws of the State of Louisiana based upon contractual agreements existing between the parties, and under the provisions of the Trademark Laws of the United States, particularly 15 U.S.C. § 116.

(R, Preliminary Injunction, 6)

On the basis of its findings of fact and conclusions of law, the court enjoined Mr. Corceller from using the Bonanza service marks, from patterning his business after the layout and method of operation of Bonanza, and from engaging in post-termination competition with Bonanza and Stewart in the low-cost steak dinner restaurant business. (R, Preliminary Injunction, 6-8).

Despite the issuance of the court's preliminary injunction, Mr. Corceller continued to use a large "Bonanza Sirloin Pit" sign located in front of his restaurant. Moreover, he continued to operate in the low-cost steak dinner restaurant business, although additional food items were added to his restaurant's menu. Because of these flagrant violations of the trial court's injunction, contempt proceedings were instituted by Bonanza and Stewart. Lengthy hearings were conducted on the Contempt Motion on January 5 and January 12, 1972, and on June 8, 1972, the court issued an Order holding Mr. Corceller in contempt for his refusal to obey the injunction. The Court stated:

> It is my finding that the large exterior Bonanza sign, the primary means of identifying the establishment, was not covered until a few days after November 22, 1971, or approximately a month after the injunction was issued. In addition, I find that the uncovered sign was lighted at night on at least one occasion in the first week of November, 1971. Furthermore, the court finds that the evidence presented to

> the effect that the tarpaulin-covered sign remained readable at night in December, 1971, was credible and persuasive. It was only after the January 12, 1972 hearing that the defendant took prompt action to dismantle the sign. This was accomplished on January 16, 1972, and the court was so informed by defense counsel's memorandum. The evidence clearly establishes defendant's recalcitrance following the injunction order, to wit: (1) telling the court that prices on all steak items had been increased by 15 cents when, in fact, because the new steak price included the price of a soft drink, the net price increase was only ten cents; (2) retaining the word "Pit" in the restaurant's name; (3) utilizing a steak item entitled the "L'il Joe," which is unmistakably connected with the name Bonanza in the minds of many television-addicted Americans, and which was at one time a service mark of Bonanza International, Inc.
>
> (R, Order of June 8, 1972, 3-4).

The court also commented on the conduct of defense witnesses at the hearing:

> The evidence presented on the removal of the large exterior Bonanza sign was characterized by contradictions, evasions and ambiguous answers, periodic memory lapses, and the impression at times that certain defense witnesses would agree to anything suggested to them by defense counsel.
>
> (R, Order of June 8, 1972 at 3).

In addition to the contempt citation, the court's Order required Mr. Corceller to delete any reference to "Pit" or to steak items in the restaurant's name. In addition, Mr. Corceller was ordered to pay $2,000 in attorneys' fees to Bonanza and Stewart to compensate them for the costs incurred in bringing the violations of the injunction to the attention of the court. Pursuant to the requirement in the Order that Mr. Corceller submit a compliance report by July 1, 1972, a sworn report was filed on July 6, 1972. It stated that the restaurant had been transferred to Mr. Corceller's son, but asserted that the name of the restaurant had been changed "from 'Frontier Pit' to 'Frontier Restaurant'." Incredibly, this sworn statement proved to be false, as counsel for Bonanza subsequently learned that the restaurant name was advertised on a sign in front of the restaurant as "Frontier Pit." The sign also publicized a "L'il Joe Eye" for sale. Contempt proceedings were again instituted and eventually formed part of the basis for the default judgment. (R, Motion to Cite for Contempt for Refusal to Obey Order, attached photograph). Mr. Corceller also failed to pay Bonanza and Stewart the attorneys' fees which the court ordered him to pay.

Although Mr. Corceller appeared before the court to defend against the request for injunctive relief and the first contempt motion, no Answer was ever filed to the prayer for money damages. After waiting nearly four months for an Answer, counsel for Bonanza sent a letter to counsel for Mr. Corceller, stating:

> **Please let me know whether you plan to file an Answer in this proceeding. If not, we will proceed to take a default judgment.**
>
> **(R, letter of January 14, 1972, attached to Application for Default Judgment by Court).**

However, counsel for Mr. Corceller ignored this warning and still did not file an Answer. After nearly seven more months elapsed, Bonanza and Stewart on August 9, 1972 applied to the court for a default judgment. Attached to the pleadings filed in connection with the application for a default judgment was a certificate of service, stating that copies of the application and the other documents were mailed to John H. Brooks, then-counsel for Mr. Corceller. On August 11, 1972 an Answer was filed on behalf of Mr. Corceller by Mr. Brooks.

On August 29, 1972, Mr. Brooks withdrew as counsel for Mr. Corceller and was replaced by Charles E. Leche. (R, Motion and Order Substituting Counsel of Record). Mr. Leche requested and received a continuance of the hearing at which damages were to be fixed pursuant to the default judgment from August 29, 1972 to October 11, 1972. (R, Motion for Continuance). The court, on its own motion, later changed the hearing to October 18, 1972. This date was also set for the hearing on the second motion of Bonanza and Stewart to cite Mr. Corceller for contempt. (R,

Order of September 12, 1972). On October 6, 1972, however, Mr. Leche withdrew as counsel of record for Mr. Corceller, asserting that "defendant has adamantly failed and refused to cooperate in any way with this firm and has refused to return counsel's telephone calls or to make himself available to discuss this firm's representation of him." (R, Motion to Withdraw as Counsel of Record). (This position was later softened in a letter to the trial judge, which indicated that Mr. Corceller's uncooperativeness may have resulted from hospitalization). (R, letter of October 12, 1972). In the meantime, the Court Reporter filed a Motion to Show Cause Why Reporter's Fee Is Unpaid, alleging that Mr. Corceller had ordered a transcript for an appeal but refused to pay for it. A hearing on the Motion was scheduled for October 18, 1972.

Mr. Corceller did not appear for the hearing scheduled for October 18, 1972, nor did anyone represent him at the hearing. Bonanza and Stewart submitted evidence which formed the basis for the default judgment. In addition, evidence of Mr. Corceller's violations of the Court's Order of June 8, 1972 was submitted. On October 29, 1972, Louis R. Koerner, Jr. entered the proceeding as counsel for Mr. Corceller. Mr. Koerner filed a Motion to Set Aside Entry of Default based on the Affidavit of Mr. Brooks, which stated that he did not file an Answer in the case because he was engaged in settlement negotiations and had been assured by counsel for Bonanza that no action would be taken against his client. However, the Affidavit of Phillip A. Wittmann, counsel for Bonanza, explicitly contradicted Mr. Brooks' assertions. It stated that only

one settlement conference was held between the parties. Moreover, the affidavit stated that this conference occurred five months before the default judgment was applied for and produced no results. Furthermore, Mr. Wittmann noted that during the period in which Mr. Brooks claimed to be in "settlement negotiations," he pressed forward with a state court suit against Bonanza and Stewart on behalf of Mr. Corceller. (R, Affidavit of Phillip A. Wittmann).

The Motion to Set Aside Entry of Default was denied by the court, after hearing, on December 6, 1972.

ARGUMENT

The default judgment entered in this case was based on a unique set of facts which totally justify the ruling of the trial court and insure that any decision on review by this Court would have little precedential usefulness. Not only did Mr. Corceller fail to file an Answer for nearly 11 months in the trial court, but he repeatedly engaged in flagrantly contemptuous conduct. In addition, the findings of fact and conclusions of law made by the trial court at the preliminary injunction hearing independently support the default judgment. In these circumstances, the default judgment was well within the discretionary power of the district court to impose sanctions to enforce the Federal Rules of Civil Procedure and uphold the dignity of the judicial process. *Moldwood Corp. v. Stutts*, 410 F.2d 351 (5th Cir. 1969); *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000 (5th Cir. 1970); and *Gulf Oil Co. v. Bill's Farm Center, Inc.*, 449 F.2d 778 (8th Cir. 1971).

Except for the argument that the trial court's authority to impose a default judgment was improvidently exercised, Mr. Corceller's Petition for a Writ of Certiorari completely fails to raise any issue justifying review of this case by the Supreme Court of the United States. No important unsettled issues of federal law are raised, nor are any conflicts between the Fifth Circuit Court of Appeals and other courts of appeals cited, nor are any special circumstances alleged to justify review. This brief, therefore, will be limited to a discussion of the legal grounds justifying the decision of the trial court.

I. THE TRIAL COURT'S DECISION TO ENTER A DEFAULT JUDGMENT WAS TOTALLY JUSTIFIED BY THE ACTIONS OF MR. CORCELLER AND THE EVIDENCE SUPPORTING THE JUDGMENT.

The default judgment entered by the trial court is supported on at least three independent grounds. Mr. Corceller's failure to file an Answer within the time allowed by the Federal Rules of Civil Procedure was inexcusable, making a default judgment appropriate. Moreover, Mr. Corceller's open and contemptuous disregard for the rules and orders of the court necessitated the default judgment. Furthermore, the findings of fact and conclusions of law made by the trial court were sufficient to sustain the judgment on the merits. None of the arguments offered by Mr. Corceller are sufficient to overcome this foundation for the ruling of the trial court. Therefore, the Petition for a Writ of Certiorari should be denied.

A. The Failure Of Mr. Corceller To File An Answer Within The Time Allowed By The Federal Rules Of Civil Procedure Was Inexcusable, Making A Default Judgment Appropriate.

The failure of Mr. Corceller to file an Answer for nearly eleven months in this case constituted a flagrant violation of Rule 12 of the Federal Rules of Civil Procedure. Rule 12 provides:

> A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him . . . .

Moreover, Rule 55 provides for the entry of a default when a party fails to file responsive pleadings:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Rule 55 also provides for entry of a default judgment by the court after application is made by the party entitled to the judgment.

In this case, the default judgment entered by the court was wholly warranted. Mr. Corceller's delay went nearly 10 months beyond the 20 day answer period prescribed by Rule 12. Furthermore, Mr. Corceller refused to file an Answer despite the warning of counsel for Bonanza that a default judgment would be ap-

plied for if no responsive pleadings were filed. This neglect easily justified the entry of the default judgment.

In *Rutland Transit Co. v. Chicago Tunnel Terminal Co.*, 233 F.2d 655 (7th Cir. 1956), the United States Court of Appeals for the Seventh Circuit upheld a trial court's decision not to set aside a default judgment. The court held that defendants' continued failure to file an Answer during extended settlement negotiations was not excusable neglect:

> [T]here is no showing of inadvertance or excusable neglect on the part of defendants. Quite to the contrary, we think defendants were guilty of inexcusable neglect and were given every opportunity by plaintiff. Thus it is apparent that the District Court properly denied defendants' motion.
>
> *Id.* at 659.

Moreover, the Third Circuit has recently upheld a district court's refusal to set aside a default judgment where defense counsel was warned by the attorney for plaintiff that a default would be taken if no Answer was filed. The court refused to reverse even though counsel for defendant claimed that a secretary had lost the letter which stated that a default would be taken. *Port-Wide Container Co. v. Interstate Maintenance Corp.*, 440 F.2d 1195 (3rd Cir. 1971). The Court said:

> **Unfortunately, according to defense counsel, the secretary in question was an unsatisfactory employee whose employment was terminated at the close of the very day she received the letter and she never delivered it to her employer. However, this circumstance did not make it inequitable for plaintiff's attorney, who had properly given notice of his intention, to proceed in accordance with the rules governing default.**
>
> The district judge did consider the fact that defense counsel never received the quoted letter but concluded that in all of the circumstances of the case it was not inequitable or unduly harsh to permit the default judgment to stand. We have examined all of the evidentiary matter submitted by the parties to the district court. We find no abuse of discretion in the action of the court. Nothing in the record indicates that the judgment as entered was a harsh or excessive award.
>
> *Id.* at 1196.

In this case, Mr. Corceller cannot even claim that his counsel did not receive the letter warning that plaintiffs would apply for a default judgment. Therefore, the failure to file an Answer was inexcusable and the default judgment should not be overturned.

B. The Continued Refusal Of Mr. Corceller To Obey The Court's Rules And Orders Justified The Entry Of The Default Judgment.

In addition to his long-term refusal to comply with the time limitations of Rule 12 for the filing of responsive pleadings, Mr. Corceller flagrantly violated the trial court's direct orders. Mr. Corceller's obstinate refusal to comply with the court's Preliminary Injunction required a citation for contempt. Moreover, even after the contempt citation, Mr. Corceller reported to the Court that the Contempt Order was being complied with, even though no attempt to follow the directive to remove "Pit" from the name of the restaurant was apparently ever made. Furthermore, Mr. Corceller simply refused to pay the civil contempt damage award entered by the trial court, even though the court awarded $1,400.00 less than the amount it deemed "reasonable" to compensate for Mr. Corceller's alleged difficult financial condition. (R, Order of June 8, 1972, at 5). Finally, the testimony of Mr. Corceller and his witnesses was so evasive and incredible that the court was moved to comment:

> The evidence presented on the removal of the large exterior Bonanza sign was characterized by contradictions, evasions and ambiguous answers, periodic memory lapses, and the impression at times that certain defense witnesses would agree to anything suggested to them by defense counsel.
>
> (R, Order of June 8, 1972, at 3).

These incredibly flagrant violations of the trial court's decrees and contemptuous disregard for the fact-finding process easily justified the entry of the default judgment in this case.

The authorities confirm that a refusal of a defendant to obey orders of a court will justify a default judgment. *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000 (5th Cir. 1970); *Flaska v. Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir. 1968); and *Gulf Oil Co. v. Bill's Farm Center, Inc.*, 449 F.2d 778 (8th Cir. 1971). In *McGrady*, where the defendant failed to answer and failed to comply with the court's rules, the Fifth Circuit said:

> The record in this case discloses sufficient evidence of appellant's delay and failure to comply with court rules to justify the entry of a default pursuant to F.R. Civ. P. Rule 55. There is considerable disagreement between the parties over whether the appellant's letter of January 24, 1969 satisfied the fundamental requirements of an answer set forth in F.R. Civ. P. Rule 8. We deem it unnecessary to decide whether appellant's purported "answer" was adequate, however, for the district court also based its order on the appellant's failure to appear at pretrial conference. There is ample authority to uphold a district court's power to order entry of a default for failure to comply with court orders or rules of procedure.
>
> 434 F.2d at 1001.

In *Flaska*, the defendant's lack of knowledge of his counsel's actions convinced the court to overturn a default. However, the inherent power of the lower court to enter the judgment was confirmed. The court stated:

> It is well established that the district court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure. While the authority is reiterated in some of the Federal Rules of Civil Procedure for particular situations, the power is one inherent in the courts "in the interest of the orderly administration of justice." It may be exercised *sua sponte* under proper circumstances.
>
> 389 F.2d at 887.

In *Gulf Oil*, the Eighth Circuit held that a district court may enter a default judgment for failure of a defendant to comply with rules or orders of the court. It stated:

> The action of the trial judge in entering a default judgment on the liability issue in this open account case for failure of defendants' then counsel to comply with pretrial orders, the Rules of Civil Procedure and to make dis-

> covery was fully warranted; the findings and conclusions of the trial court entered after a plenary hearing on the amount in dispute, and the final judgment of $28,900.00, plus interest, were fully justified on the record.
>
> 449 F.2d at 779.

McGrady, *Flaska* and *Gulf Oil* establish beyond doubt that the default judgment in this case was proper. Mr. Corceller's flagrant violations of the trial court's orders not only justified, but necessitated the action of the court.

C. The Findings Of Fact And Conclusions Of Law Made By The Trial Court Are Sufficient To Sustain A Judgment On The Merits, Eliminating Any Policy Considerations Against Sustaining The Default Judgment.

The trial court made extensive findings of fact and conclusions of law in favor of Bonanza and Stewart in this case, after conducting lengthy hearings. The court held at least three adversary proceedings, including the preliminary injunction hearing and two hearings on the contempt motion of Bonanza and Stewart. The findings made by the court would provide a sufficient basis for a judgment on the merits, even if a default judgment were not justified.

The trial court concluded at the preliminary injunction hearing that Mr. Corceller had failed to pay royalties due Bonanza and Stewart and had refused to

comply with other requirements of the License Agreement. It also determined that use of Bonanza service marks by Mr. Corceller and his continued engagement in the low-cost steak dinner restaurant business was illegal and damaged Bonanza and Stewart. In addition, in its order holding Mr. Corceller in contempt, the court found that he had violated the preliminary injunction by continuing to use a large Bonanza sign located in front of the restaurant, to the further detriment of Bonanza and Stewart, even after he was ordered to discontinue using the sign.

The findings and conclusions made by the trial court formed the basis for the money damages awarded pursuant to the default judgment. Mr. Corceller is required by the judgment to pay over the royalties due Bonanza and Stewart under the License Agreement; to account for the damages sustained by Bonanza and Stewart because of Mr. Corceller's trademark infringement, these damages to be trebled as authorized by 15 U.S.C. § 1117; and to pay attorneys' fees to Bonanza and Stewart, which may be awarded because of Mr. Corceller's repeated contemptuous conduct. A substantive basis for each of these portions of the default judgment is provided by the findings and conclusions of the trial court.

D. The Arguments Offered On Behalf Of Mr. Corceller Are Insufficient To Dispel The Solid Grounds Supporting The Default Judgment.

The three independent grounds supporting the default judgment provide overwhelming justification for

the trial court's ruling. Moreover, the arguments offered on behalf of Mr. Corceller have no validity and should not be used to disturb the trial court's decision.

1. Adequate notice of the application for a default judgment was served on Mr. Corceller.

Mr. Corceller attempts to excuse his extended failure to file an Answer by asserting that counsel for Bonanza and Stewart gave him inadequate notice of their intention to take a default judgment. The record, however, reveals that on January 14, 1972, nearly seven months before the default judgment was applied for, counsel for Bonanza warned counsel for Mr. Corceller that a default judgment would be taken if no Answer was filed. (R, letter of January 14, 1972, attached to Application for Default Judgment by Court). Moreover, the certificate filed with the application for a default judgment establishes that the "Request to Clerk to Enter Default, Affidavits, Notice, Application for Default Judgment, Order and Memorandum" were mailed to counsel for Mr. Corceller on the day Bonanza and Stewart applied for the default judgment. Two days later an Answer was filed on behalf of Mr. Corceller, indicating these documents were received. Furthermore, Rules 12 and 55 of the Federal Rules of Civil Procedure are hardly difficult to comprehend, and they clearly authorize a default judgment where the defendant refuses to file responsive pleadings within 20 days. Therefore, the claims of inadequate notice of Mr. Corceller are ludicrous.

2. The Motion To Stay filed on behalf of Mr. Corceller was no substitute for an Answer.

In his search for theories with which to attack the default judgment, Mr. Corceller offers the novel approach that his Motion to Stay the injunction proceedings was really an Answer. Aside from the failure of the Motion to Stay to comply with the general rules of pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, the Motion was not labeled "Answer" and was obviously not intended as an Answer. Moreover, Mr. Corceller's appearance to file the Motion to Stay and to attempt to ward off an injunction underscores the inexcusability of his failure to file a *real* Answer; Mr. Corceller had full knowledge of the proceedings and yet wilfully refused to file responsive pleadings, despite a warning that Bonanza and Stewart would apply for a default judgment. Furthermore, even if the Motion to Stay could substitute for an Answer, the Motion would not cure Mr. Corceller's contemptuous conduct or remove the substantive basis for the judgment. Thus, this contention should be rejected.

3. The affidavit of Mr. Corceller's counsel concerning the pendency of settlement negotiations provides no basis for disturbing the default judgment.

The affidavit of John H. Brooks, former counsel for Mr. Corceller, that he had been assured by counsel for Bonanza during settlement negotiations that "no further action would be taken" provides no basis for

questioning the default judgment. The affidavit is belied by the letter sent to Mr. Brooks by counsel for Bonanza, warning that a default judgment would be taken, and is directly contradicted by the affidavit of Phillip A. Wittmann, counsel for Bonanza. Mr. Wittmann's affidavit states that Mr. Brooks was never assured that "no further action would be taken." In addition, it states that there is no reference in Mr. Wittmann's files to any settlement negotiations during the period immediately preceding the application for a default judgment. (R, Affidavit of Phillip A. Wittmann). The trial court had the opportunity to consider both affidavits in this case, and obviously found the affidavit of Mr. Wittmann persuasive.

Even if Mr. Brooks' affidavit could excuse his failure to file an Answer within the time prescribed by the Federal Rules, it does nothing to obviate Mr. Corceller's refusal to obey the orders of the court or the evidence supporting the trial court's judgment. Therefore, the affidavit cannot be used to disturb the default judgment.

II. THE ALLEGATIONS OF ANTITRUST VIOLATIONS AND FRAUD MADE ON BEHALF OF MR. CORCELLER SHOULD NOT AFFECT THE DEFAULT JUDGMENT.

Attached to Mr. Corceller's Motion to Set Aside Entry of Default in the trial court was a Complaint filed on behalf of Mr. Corceller on or about October 27, 1972, after the hearing on damages pursuant to the default judgment. This Complaint charged Bonanza, Stewart,

and a number of other defendants with antitrust violations and fraud. Each of the charges is groundless. Included in the allegations in the Complaint was the assertion that the injunction proceeding in the trial court, as well as a deposition taken in connection with the proceeding, were antitrust violations. (R, Complaint, C.A. No. 72-2913, Paragraphs 24 and 25). The trial judge was given an opportunity to review these allegations prior to ruling on the Motion to Set Aside Entry of Default and held that they did not provide a basis for disturbing the default judgment.

The new allegations filed on behalf of Mr. Corceller should not affect the default judgment. The allegations are preposterous and totally lacking in factual support. Moreover, Mr. Corceller will have a full opportunity to litigate these claims in the suit he has filed. Thus, there is no need to allow him to reopen this case to assert the claims here. Furthermore, these allegations, even if meritorious, would not cure Mr. Corceller's failure to file an Answer nor obviate his contemptuous conduct in this case. Therefore, the new allegations should not be allowed to disturb the default judgment.

III. THE DAMAGES AWARDED PURSUANT TO THE DEFAULT JUDGMENT MAY NOT BE QUESTIONED ON APPEAL AND WERE WITHIN THE POWER OF THE TRIAL COURT.

A full hearing was conducted in the trial court on the question of damages on October 18, 1972. Mr. Corceller was given adequate notice of this hearing, but

elected to neither appear nor send a representative. On the basis of the evidence presented at the hearing, the trial court entered modest awards of damages in three categories: (1) unpaid royalties; (2) damages for trademark infringement, which were trebled pursuant to 15 U.S.C. § 1117; and (3) attorneys' fees expended by Bonanza and Stewart. Each category of damages conformed to the prayer of the Complaint. At the hearing on the Motion to Set Aside Entry of Default in the trial court, no question was raised on behalf of Mr. Corceller as to the propriety of any element of damages.

The law is settled that when a default judgment that conforms to the Complaint is properly entered, the merit of the plaintiff's case may not be litigated on appeal. In *Hopkins v. McClure*, 148 F.2d 67 (10th Cir. 1945), the court upheld a default judgment where the amount of the judgment was questioned on appeal. It said:

> An aggrieved party may prosecute a timely appeal from a default judgment, but the distinct and positive averments in the complaint, upon which the judgment is rendered, are conclusively binding upon the appellant, and insofar as the judgment conforms to the complaint, it is unassailable on appeal.
>
> * * *
>
> In cases where the appeal is from the order denying the motion to vacate, the scope of the

> **appeal is, of course, confined to the points complained of in the motion and to the order of the court from which the appeal is taken. In other words, the appellant may not complain on appeal of that which she did not complain in the motion to vacate.**
>
> *Id.* at 69-70.

In this case, the categories of damages in the judgment of the trial court conformed to the complaint and therefore the judgment is "unassailable on appeal." Moreover, since Mr. Corceller's objections to the elements of damages were never asserted in the trial court, they may not be used now to disturb the default judgment.

In addition to the procedural impropriety of Mr. Corceller's attack on the damages award on this appeal, the amount of the default judgment should not be disturbed because each element of damages has a sound legal basis. The royalties awarded to Bonanza and Stewart were the proper subject of damages because these royalties were improperly withheld under the License Agreement. The damages awarded for trademark infringement are authorized under the Lanham Act, which also provides that these damages may be trebled: "In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount." 15 U.S.C. § 1117. Furthermore, while attorneys' fees are not normally cognizable as an element of damages un-

der the Lanham Act, they may certainly be awarded where a party repeatedly engages in activities constituting contempt of court. In this case, the trial court had already held Mr. Corceller in contempt on one occasion and had before it evidence of a further failure to comply with its Order of June 6, 1972. Mr. Corceller and his witnesses had evaded the truth under oath to such an extent that the trial court was moved to comment that their testimony was characterized by "contradictions, evasions and ambiguous answers, periodic memory lapses, and the impression at times that certain defense witnesses would agree to anything suggested to them by defense counsel." And, of course, Mr. Corceller's counsel had completely ignored the Federal Rules of Civil Procedure. Under these circumstances, an award of attorneys' fees was appropriate to help compensate Bonanza and Stewart for the heavy expenses incurred in achieving compliance with the court's order. As this Court said in the case cited on behalf of Mr. Corceller, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404 (1967): "[I]n a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant." *Id.* at 718.

The damages awarded by the trial court pursuant to the default judgment may not be questioned for the first time on this appeal. In addition, each element of damages enjoys a sound legal basis. Therefore, the amount of the default judgment should not be disturbed.

CONCLUSION

The Petition for a Writ of Certiorari in this case totally fails to raise any issue justifying review of the default judgment by this court. The default judgment was justified on three independent grounds and was fully within the discretion of the trial court. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of October, 1973.

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